Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College *and* Asociacion de Maestros Universitarios

Asociacion de Maestros Universitarios *and* Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College. Cases 24-CA-4133 and 24-CB-1053

October 12, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 20, 1981, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, Respondent Employer and Respondent Union both filed exceptions and supporting briefs, and Respondent Employer filed an answer to Respondent Union's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

We agree with the Administrative Law Judge that Respondent Employer violated Section 8(a)(5) and (1) of the Act, first by unilaterally discontinuing evaluations for faculty retention (i.e., past the 2-year probationary period), tenure, and promotion, without prior notice to or bargaining with Respondent Union, and thereafter by refusing to bargain with Respondent Union about the inclusion of these subjects in the collective-bargaining agreement then being negotiated.

In doing so, we note that Respondent Employer's defense against the allegations of unlawful refusal to bargain is elusive. Respondent Employer did not allege in its answer to the instant complaint, as an affirmative defense against the allegations that it unlawfully refused to bargain with Respondent Union about evaluations, that the faculty was supervisory or managerial, and that Respondent Employer was thus not obligated to bargain with Respondent Union. Indeed, Respondent Employer admitted in its answer that Respondent Union was at all times material in this case the certified and recognized collective-bargaining representative for the instant full-time faculty unit; further, the record establishes that Respondent Employer did engage in continued productive bargaining with Respondent Union in negotiations over a new collective-bargaining agreement, and reached agreement with Respondent Union on many subjects.

Instead, Respondent Employer's argument concerning the supervisory or managerial status of the faculty appears to be confined to the faculty's participation in the evaluation process. Thus, Respondent Employer alleged in its answer to the complaint that "faculty rank and tenure not being mandatory subjects of bargaining under the Act . . . Respondent Employer did not violate the Act by refusing to bargain [about those subjects]." Later, in its opening statement at the hearing, Respondent Employer espoused a position which it described as "more limited than in *N.L.R.B.* v. *Yeshiva*."[2] It asserted that the full-time faculty acts as both employer and employees with regard to evaluations for retention, tenure, and promotion, thereby rendering those items nonmandatory subjects of bargaining, and thus relieving Respondent Employer of any obligation to bargain about them. Finally, in its post-hearing brief to the Administrative Law Judge, Respondent Employer argues that in the areas of faculty evaluation for retention, tenure, and promotion the faculty acts in a supervisory or managerial way, and that, therefore, Respondent Employer is not obligated to bargain with Respondent Union about these subjects.

Thus, according to Respondent Employer in its brief to the Administrative Law Judge:

> In [*Yeshiva*] it was determined that there are *certain academic activities* in institutions of higher education where members of the faculty substantially participate in the institutional governance matters, and because of that fact, said faculty members and *said activities* are out-

[1] In affirming the Administrative Law Judge's finding that Respondent Employer violated Sec. 8(a)(5) and (1) of the Act by unilaterally terminating evaluations for faculty rank, probation, and tenure, without prior notice to or bargaining with Respondent Union, and by thereafter refusing to bargain about the inclusion of such evaluation procedures in the collective-bargaining agreement then being negotiated, we do not rely on the distinction drawn by the Administrative Law Judge between *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980), and the instant case. The Administrative Law Judge distinguished the two cases on the grounds that *Yeshiva* involved the refusal of an employer to negotiate an initial collective-bargaining agreement with a contested faculty unit, whereas the instant case involved the refusal of Respondent Employer to negotiate about the renewal of a part of an existing collective-bargaining agreement with a certified (pre-*Yeshiva*) faculty unit. These latter aspects of the instant case do not foreclose analysis of the managerial issue in this case under the framework for such analysis set forth in *Yeshiva*.

[2] Opening statements in the instant proceeding were made on February 11, 1980, 9 days before the Supreme Court delivered its opinion in *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672. Thus, Respondent Employer's reference to "*N.L.R.B.* v. *Yeshiva*" is apparently to the underlying decision of the U.S. Court of Appeals for the Second Circuit, 582 F.2d 686 (1978), which was affirmed by the Supreme Court.

side the jurisdiction of the NLRB since the faculty acts as managers under the Act.

* * * * *

It is our contention that in the specific activity of the granting or denial of evaluation, rank and tenure at Puerto Rico Junior College . . . the faculty of said college has substantial participation [in] that process and was exercising therein managerial functions, thus putting *the issue* outside the jurisdiction of the NLRB or of collective bargaining. It is Respondent's contention that [the] NLRB must refrain from exercising its jurisdiction in those *specific activities* in academia that encompass such a thorough participation of faculty and that its intervention would imply putting faculty "on both sides of the bargaining table. . . ." [Emphasis supplied.]

* * * * *

Where, as in the case at bar, management has reserved the right to grant or deny evaluation, rank and tenure and has delegated it to a group of faculty members acting in committee, a participatory model is in existence, the faculty is acting *in that specific activity* in a managerial capacity and NLRB intervention is not warranted by law.[3]

We specifically reject Respondent Employer's assertion that a faculty unit (or, for that matter, any appropriate bargaining unit) may be found to be supervisory or managerial only for certain aspects of wages, hours, and other terms and conditions of employment, but not for others. There is simply no warrant for the contention that a unit of employees can be an *appropriate* unit for bargaining about *some* aspects of terms and conditions of employment, while simultaneously being an *inappropriate* unit for bargaining about *other* aspects of the employment relationship.

There certainly is no support to be found for Respondent Employer in either the Supreme Court's or in the Second Circuit Court of Appeals' opinions in *N.L.R.B.* v. *Yeshiva University*. Thus, contrary to the assertion of Respondent Employer, neither the court of appeals nor the Supreme Court determined that *certain academic activities* are outside the jurisdiction of the Act because the faculty acts as managers in regard to those activities. On the contrary, the court of appeals defined the issue as whether the full-time faculty were supervisors within the meaning of Section 2(11) of the Act or managerial personnel within the Board's definition of that term as adopted by the courts.[4] Indeed, far from determining that the faculty at Yeshiva University was supervisory or managerial for only specified aspects of terms and conditions of employment, the court of appeals noted that the supervisory and managerial authority of that faculty was "pervasive and consistently exercised."[5]

Nor did the Supreme Court, in affirming the court of appeals in *Yeshiva*, determine that *certain academic activities* are outside the jurisdiction of the Act. Indeed, the Court found that the Yeshiva faculty's authority in regard to *academic matters* was "absolute,"[6] and that the faculty's role in hiring, tenure, promotion, and termination was "predominant."[7] There was no attempt—or apparent inclination—on the part of the Court to sift out discrete aspects of the employment relationship in its determination that the faculty was managerial.

Nor did the Supreme Court, in reviewing the history of the managerial exclusion in *N.L.R.B.* v. *Bell Aerospace Co., supra*, expressly or impliedly raise the possibility of such bifurcated bargaining as proposed by Respondent Employer in this case. Thus, as stated, there is no warant for a piecemeal application of the Supreme Court's holding in *N.L.R.B.* v. *Yeshiva University*. Rather, the managerial and supervisory exclusions are total exclusions from the coverage of the Act, applicable in all ways to all individuals within the group so denominated. These exclusions are decidedly not applicable to particular *bargaining subjects*, as Respondent Employer would have them apply to the faculty evaluation process in the instant case.

Moreover, we agree with the Administrative Law Judge's rejection of Respondent Employer's contention that the nature and extent of the faculty's involvement in the evaluation of individual faculty members establishes that the faculty is supervisory within the meaning of Section 2(11) of the Act, or managerial within the scope of the Supreme Court's opinion in *N.L.R.B.* v. *Yeshiva University, supra*. More precisely, we find that Respondent Employer has failed to establish its contention that the full-time faculty acts in a supervisory or managerial manner in the process of faculty evaluation.

[3] Respondent Employer essentially adheres to this statement of its position in its brief in support of its exceptions to the Administrative Law Judge's conclusion that it unlawfully refused to bargain with Respondent Union about evaluation matters.

[4] 582 F.2d at 694–695. The definition of "managerial employees" referred to by the court is "those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.'" *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 288 (1974).

[5] 582 F.2d at 695, fn. 10.

[6] 444 U.S. at 686.

[7] *Id.* at fn. 23.

The essential facts are as follows: According to the terms of the November 1, 1975–October 31, 1978, collective-bargaining agreement between the parties, new faculty members serve an initial 2-year probationary period. At any time during this period, the faculty member's employment may be terminated without the faculty member having any recourse to the contractual grievance and arbitration procedure. At the end of the 2-year probationary period, the faculty member is evaluated for possible retention. If this evaluation is not favorable, then, again, the faculty member's employment may be terminated without recourse by the faculty member to the contractual grievance and arbitration procedure. Faculty members who are retained beyond the 2-year probationary period are given annual appointments for their third, fourth, and fifth years of service. Any actions taken by Respondent Employer which affect the employment status of a faculty member during the third-through-fifth-year period of service may be reviewed under th contractual grievance procedure.

Upon completion of 5 years of uninterrupted service, faculty members are evaluated for tenure. Tenured faculty members are evaluated for promotion through the ranks of assistant professor, associate professor, and professor.

Hiram Puig, Respondent Employer's chancellor, and, in that capacity, its chief administrative and academic officer, testified about the organizational structure of the school as it pertains to the evaluation process. According to Chancellor Puig, the "main legislative board" of the school is the Administrative Council, which has final authority over all administrative and policy matters, subject only to the veto of the president of the Fundacion. The Administrative Council has 13 members: the chancellor, five deans,[8] the "Title III" director,[9] three students (elected by the student body), and three faculty members (elected by the faculty).

Immediately below the Administrative Council is the Academic Board, described by Chancellor Puig as "a forum where all matters concerning the faculty and college are brought and discussed; and from where those matters go the [Administrative Council]." The Academic Board has approximately 26 members: the chancellor, the academic dean, the associate dean, the Institute directors,[10] and a faculty member from each Institute (elected by the faculty of that particular Institute).[11]

Below the Academic Board, with regard to evaluation of faculty members, is the schoolwide General Evaluation Committee, comprised of the academic dean, the dean of Learning Resources,[12] a representative of Respondent Union, and a faculty member.[13]

Finally, each Institute has an Evaluation Committee, comprised of the Institute director and two faculty members.[14]

Each faculty member being evaluated for retention upon completion of probation, for tenure, or for promotion is evaluated in three separate ways: by students, by the Institute Evaluation Committee (based on classroom observation), and by the General Evaluation Committee. The student and Institute evaluations are provided to the General Evaluation Committee, which itself prepares a separate evaluation of the faculty member's administrative performance, and then compiles an overall evaluation for that faculty member.

The overall evaluation compiled by the General Evaluation Committee is forwarded to the Academic Board, which in turn forwards it to the Administrative Council, with the Academic Board's recommendation in regard to whatever action is being considered (i.e., retention, tenure, or promotion). As indicated, the Administrative Council has final authority in such matters, subject only to the veto of the Fundacion's president.[15]

All of the above-described evaluations are rendered in accordance with procedures proposed by the Academic Board, and approved by the Administrative Council, following preliminary consideration by a Special Committee of the Administrative Council comprised of two administrators, two faculty members, and two representatives of Respondent Union.[16]

[8] Not further specified in the record.

[9] Also not further specified in the record.

[10] Institutes at the instant school are akin to academic departments. Although the record is not absolutely clear in this regard, there are apparently nine such Institutes: Business Administration, Education, English, Humanities, Natural Science, Nursing, Secretarial Science, Social Science, and Spanish. Each Institute has a director, akin to an academic department chairman. Institute directors are not included in the bargaining unit.

[11] The Academic Board also acts as the school's Curriculum Committee, which convenes at the call of the chancellor. According to Chancellor Puig, the Curriculum Committee has been convened twice during the 2-1/2 years prior to the hearing.

[12] Not further specified in the record.

[13] The record does not indicate whether the faculty member on the General Evaluation Committee is elected or appointed to that position.

[14] Associate Professor Idsa Alegria, Respondent Union's sub-secretary-general and a member of the faculty for 13 years, testified that one of the faculty members on the Institute Evaluation Committee is appointed by the Institute director, while the other is elected by the Institute faculty. However, Chancellor Puig testified that both of the faculty members on the Institute Evaluation Committee are elected to their positions.

[15] Chancellor Puig testified that the president has never exercised his veto in this regard. Union sub-secretary-general and Associate Professor Alegria testified that not all probationary faculty members have been retained, and that not all faculty members are awarded tenure. However, Respondent Union's secretary-general, Carmelo Rodriquez, testified that he was not aware of any faculty member who did not receive tenure upon completion of 5 years of service. Also according to Rodriquez, no one had been evaluated for promotion in approximately 8 years.

[16] Once again, the record does not indicate whether the faculty members on this Special Committee are appointed or elected.

Reviewing this evidence, we find that, while faculty members are elected to the Administrative Council and to the Academic Board, and serve, either through election or by appointment, on the schoolwide General Evaluation Committee and on the separate Institute Evaluation Committees, they are in the majority only on the separate Institute Evaluation Committees, have no more than an equal voice on the schoolwide General Evaluation Committee, and are in the decided minority on the Academic Board (9 faculty out of approximately 26 members of the Board) and on the Administrative Council (3 out of 13). Thus, as the evaluation of any particular faculty member ascends through the hierarchy of the evaluation process, the potential for effective faculty influence on the evaluation undergoes a corresponding decline. Moreover, this obvious progressive diminution of faculty influence in the evaluation process must also be considered in light of the fact that the only evaluation rendered by a committee with faculty majority, the Institute Evaluation Committee, is immediately diluted in the next step of the process, wherein the schoolwide General Evaluation Committee combines the Institute evaluation with the student evaluation, and its own evaluation, to compile an overall evaluation.

Thus, the *potential* for effective faculty influence in the overall evaluation process is markedly limited.

Beyond that, the record fails to establish the *actual* nature and extent of specific faculty participation in the evaluation process, and the actual extent of faculty influence in the retention, tenure, and promotion of faculty members. In the absence of such factual underpinnings in the record before us, we cannot say, as the Supreme Court was able to say in *N.L.R.B.* v. *Yeshiva University*, that the faculty plays a "predominant role in faculty . . . tenure . . . termination and promotion."[17]

In these circumstances, we find that Respondent Employer has failed to establish that the instant faculty has the authority, in the interest of Respondent Employer, and exercised through the use of independent judgment, effectively to recommend the promotion, discharge, or reward of individual faculty members,[18] or that the instant faculty formulates and effectuates management policies in regard to faculty evaluations by expressing and making operative the decisions of Respondent Employer in the matter of faculty evaluations.[19]

Accordingly, we affirm the Administrative Law Judge's conclusion that Respondent Employer violated Section 8(a)(5) and (1) of the Act by unilaterally terminating the existing faculty evaluation procedures governing retention, tenure, and promotion, without prior notice to or bargaining with Respondent Union, and by thereafter refusing to bargain with Respondent Union about those procedures.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent Employer, Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College, Rio Piedras and Cupey, Puerto Rico, its officers, agents, successors, and assigns, and the Respondent Union, Asociacion de Maestros Universitarios, its officers, agents, and representatives, shall take the action set forth in the said recommended Order.

[17] 444 U.S. at 686, fn. 23. Cf. *Ithaca College*, 261 NLRB 577, 578 (1982), and *Thiel College*, 261 NLRB 580, 585 (1982) (substantial evidence in both cases of effective faculty participation in and influence on decisions regarding tenure, termination, and promotion); *Duquesne University of the Holy Ghost*, 261 NLRB 587, 588 (1982) (tenure awarded according to vote of tenured faculty).

[18] See Sec. 2(11) of the Act, 29 U.S.C. § 152(11) (supervisory status).

[19] See, e.g., *N.L.R.B.* v. *Yeshiva University*, 444 U.S. at 682; *N.L.R.B.* v. *Bell Aerospace Co.*, 416 U.S. at 288 (managerial status).

DECISION

STATEMENT OF THE CASE

RICHARD L. DENISON, Administrative Law Judge: This consolidated proceeding was heard in Hato Rey, Puerto Rico, on February 11-14, 1980. The consolidated complaint, issued August 3, 1979, alleges that Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College, hereafter referred to as the Respondent Employer, or the College, violated Section 8(a)(5) and (1) of the Act, on or about February 16, 1979, and thereafter, by failing and refusing to bargain in good faith with Asociacion de Maestros Universitarios, hereafter referred to as the Respondent Union, or the Union. The complaint does not contain any allegation of "course of conduct" bad-faith bargaining or a lack of intention to reach an agreement.[1] Specifically, it is alleged that on or about February 16 the Respondent Employer unilaterally terminated the existing faculty evaluation procedure governing probation, rank, and tenure, without prior notice to or bargaining with the Union, and thereafter refused and continues to refuse to discuss faculty rank and tenure. It is also alleged that from February 16 until May 11 the Respondent Employer refused to discuss and negotiate with the Union concerning faculty probation. The complaint further alleges that from February 23

[1] At the hearing, consistent with the complaint, counsel for the General Counsel disavowed any intent to proceed on the basis of a general bad-faith bargaining theory.

until March 9 the Respondent Employer replied to a union proposal for dues checkoff by means of a counterproposal seeking a 20-percent service charge on the total amount of money collected by the College for checkoff purposes. In addition, it is alleged that on March 14 the Respondent Employer bargained directly with unit employees and offered them a different and more advantageous medical plan than it had offered the Union during negotiations, which it thereafter withdrew on March 23 following the Union's acceptance. Finally, it is alleged that on March 21 the Respondent Employer unilaterally reinstated the procedure for evaluating probation and tenure and on April 9 the procedure for evaluating faculty rank, which it had unilaterally discontinued on February 16, without prior notice to or bargaining with the Union.

Concerning the Respondent Union, the complaint alleges that it violated Sections 8(b)(3) and 8(d) by failing to notify the Federal Mediation and Conciliation Service and the Commonwealth of Puerto Rico Conciliation and Arbitration Bureau of the existence of a dispute, as required by Section 8(d)(3), and by engaging in a strike from April 25 until May 7 in furtherance of its expressed desire to terminate the collective-bargaining agreement and in furtherance of its demands.

The Respondents' answers, respectively, deny the allegations of unfair labor practices alleged in the complaint. Upon the entire record in the case, including my observation of the witnesses and consideration of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

As alleged in the complaint and admitted in the answers, I find that the Respondent Employer is, and has been at all times material herein, a nonprofit foundation duly organized under, and existing by virtue of, the laws of the Commonwealth of Puerto Rico, where it is engaged in the operation of post-secondary educational institutions at Turabo, Puerto Rico, known as Colegio Universitario del Turabo; and at Rio Piedras and Cupey, Puerto Rico, known as Puerto Rico Junior College, the only educational institution involved in this proceeding.

During the year preceding the issuance of complaint in this matter, a representative period, the Respondent Employer, in the course and conduct of its business, purchased and caused to be transported and delivered to its educational institutions goods and materials valued in excess of $50,000, which were transported and delivered in interstate commerce to said educational institutions directly from States of the United States. During the same period of time the Respondent Employer derived gross revenues in excess of $1 million, exclusive of contributions, from the operations of said educational institutions. It is admitted, and I find, that the Respondent Employer is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

As alleged in the complaint and admitted in the answers, I find that the Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES IN CASE 24–CA–4133

A. *Background*

The Respondent Employer is a nonprofit foundation which operates educational institutions, one branch of which is Puerto Rico Junior College. The Respondent Union, originally certified by the Board on January 30, 1975, as the collective-bargaining representative for the faculty employees of the College, had a 3-year agreement with Fundacion, which expired October 31, 1978. That agreement included provisions for evaluations of faculty members for release or retention following a probationary period, and governing the granting or denial of rank and tenure. It also contained a dues-checkoff clause. Following the Union's July 28, 1978, request for the termination or modification of the contract, in September 1978, the parties began negotiations for a new contract. At the outset of the negotiations the parties had agreed that each time agreement was reached on a particular clause it would be initialed by the chief spokesman as no longer in issue, and tentatively agreed to subject to achieving agreement on a complete contract ratified by the Union's membership. The record reveals that this procedure was followed throughout the negotiations, even with respect to certain individual clauses originally contained in "package" or "global" proposals submitted by Fundacion. A hiatus in the collective-bargaining negotiations occurred, beginning November 17, 1978, when a decertification petition was filed with the Board, and ending with the recertification of the Union on February 6, 1979.[2] Collective-bargaining sessions were held on February 14 and 23, March 9 and 23, and April 20 and 27. Strike authorization was voted by the Union's membership at a meeting on April 18. The Union's board of directors decided on April 21 to strike. The strike began on April 25. On April 27 Fundacion declined to negotiate further until the "illegal" strike ended.

Although the parties had exchanged contract proposals early in the negotiations and had met a few times in September, October, and early November 1978, when the negotiations reconvened on February 14 the Union's chief negotiator, Federico Rivera Saez, insisted that bargaining begin again because "there had been some elections held." Fundacion's chief negotiator and labor relations consultant, Raul Salgado, expressed his surprise at this position, but nevertheless submitted a previously pre-

[2] Hereafter, all dates are in 1979 unless otherwise specified.
The appropriate collective-bargaining unit is:

> All full-time teaching personnel employed by the Employer, Fundacion Educativa Ana G. Mendez, at its two Puerto Rico Junior College campuses located in Rio Piedras and Cupey, Puerto Rico; including instructors, associate professors, professors, Academic Counselors II, the Specialists in English, Spanish and Mathematics and athletic instructor/coaches.

pared "counterproposal" for the Union's consideration prior to the next meeting, which was set for February 23.

B. *The Unilateral Discontinuance of Faculty Evaluations*

At the February 23 meeting Saez noted that Fundacion's proposal did not contain clauses governing evaluations for faculty rank, probation, and tenure. Salgado stated that the College was not going to negotiate on those clauses since they were not mandatory subjects of bargaining. However, no mention was made of the fact that Respondent Fundacion had actually discontinued evaluations on February 16; nor did the Union receive any official notice of this action until March 21 and April 9, respectively, when Chancellor Hiram H. Puig announced, by memoranda, their resumption. However, the College maintained its refusal to include evaluation procedure clauses in the new contract, on the ground that evaluation was not a mandatory subject for bargaining and was a management right, until the bargaining session on April 20, when it shifted its position.

At the April 20 meeting, in response to the Union's March 23 package proposal containing an evaluation clause, Salgado stated that Fundacion was willing to give the Union a proposal providing for deferral of the negotiations of the evaluation clause until the issuance and assessment of the United States Supreme Court's then pending decision in *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980), which Respondent Fundacion had argued, and continued to assert, would be controlling concerning its obligation to bargain on this issue. However, no specific proposal along this line was given the Union at this meeting. The Union demonstrated its lack of interest in the suggested deferral arrangement by Saez' unavailability thereafter, despite his request at the end of the April 20 meeting that Salgado contact him no later than April 24.

I find that Respondent Fundacion's reliance on the *Yeshiva* case is misplaced. *Yeshiva* arose as the result of the university's postelection refusal to bargain concerning an initial contract with the certified union of a unit of full-time faculty members found appropriate by the Board. By means of this proceeding Yeshiva obtained court review of the Board's unit determination in the representation proceeding reviewing its originally rejected contention that all of its faculty members were not employees within the meaning of the Act because they were managerial or supervisory personnel. The Board adhered to its unit finding, and ordered the university to bargain.[3] The Court of Appeals for the Second Circuit denied the Board's petition for enforcement of its Order, holding that the faculty had "managerial status" sufficient to remove them from the coverage of the Act.[4] The United States Supreme Court granted certiorari, and affirmed the court of appeals on the basis of the unique facts of the *Yeshiva* case, stating:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[5]

The instant case, in my view, is clearly distinguishable from *Yeshiva*. First, unlike *Yeshiva*, which stemmed from a refusal to negotiate a first contract covering a contested unit, this case originates from negotiations arising from a previous collective-bargaining contract covering an agreed-upon faculty unit. Indeed, as counsel for the General Counsel urges, Respondent Fundacion's answer, in the light of Section 9(a) of the Act, admits the appropriate unit allegation of paragraph 5 of the complaint.

Second, the issue presented herein is entirely different from that of *Yeshiva*; i.e., whether because of the Court's *Yeshiva* decision, and despite the inclusion of such clauses in the previous 3-year labor agreement, faculty evaluation for the purposes of probation, rank, and tenure is a mandatory subject for bargaining. Fundacion contends it is not. I disagree since it is self-evident that such evaluations are determinative concerning the question of retention or termination, in the case of probation, or attaining job security, in the case of tenure. Therefore, as such, they have the status of conditions of employment, which the Board has long held to be mandatory subjects for bargaining.

Finally, and most significantly, although the undisputed testimony of Chancellor Puig clearly shows that full-time faculty members have *participated* in the evaluation process through their faculty representatives at most all levels of the decisionmaking process in various administrative and academic committees, boards, and councils, there was no evidence, offered by Respondent Fundacion in support of its affirmative defense, to show that Fundacion's faculty meets the Court's *Yeshiva* test for managerial employees; i.e., absolute authority in academic matters. To the contrary, the record does show that faculty representation in these forums is substantially in the minority, and, in addition, the chancellor may reject their recommendations and the Foundation president may veto them.

I therefore find and conclude, for the reasons set forth above, that the *Yeshiva* decision is not controlling, and that evaluation of faculty members for purposes of probation, rank, and tenure is a mandatory subject for bargaining.

[3] 231 NLRB 597 (1977).
[4] 582 F.2d 686 (1978).
[5] 444 U.S. at 686.

Since it is undisputed that Respondent Fundacion unilaterally discontinued these evaluations from February 16 until March 21 (probation and tenure) and April 9 (rank) and thereafter refused to bargain concerning the inclusion of an evaluation clause in the collective-bargaining agreement, I find that Respondent Fundacion violated Section 8(a)(5) and (1) of the Act as alleged in paragraphs 8(a), (b), and (c) of the complaint.[6]

C. *The Alleged Bad-Faith Bargaining With Respect to Respondent Fundacion's Proposed 20-Percent Service Charge for Administering Dues Checkoff*

Respondent Fundacion's proposal of February 14, which was reviewed by the parties during the February 23 session, contained a provision, not included in the previous contract, establishing a 20-percent service charge for its role in processing employee dues-checkoff deductions. Credited testimony by Raul Salgado reveals that during the ensuing discussions of this proposal Fundacion attempted to justify its position on the basis of its costs for administering the checkoff provision, although he was unable to locate any detailed discussion of cost in the minutes of the meeting. The Union countered that the College did not charge other institutions for making similar deductions. Apparently this argument was persuasive, for at the next meeting on March 9 Fundacion withdrew its demand for a service charge and the parties reached an agreement on the basis of the checkoff clause in the prior contract, which they later initialed on April 20 without further change.

I find that the General Counsel has failed to prove that Fundacion violated the Act by its conduct relating to the checkoff service charge proposal. The complaint does not allege that Respondent Fundacion engaged in a course of conduct designed to frustrate bargaining, or demonstrated a lack of intent to reach a final and binding agreement with the Union. Moreover, counsel for the General Counsel specifically disavowed such a broad theory of the case, and expressed an intention to prove only the specific violations of Section 8(a)(5) specified. In any event, there is no evidence that the proposal was designed or itself tended to disparage or undermine the Union in the employees' eyes. When the negotiations reconvened on February 14, the College acceded to the Union's request that negotiations begin again. Fundacion gave the Union its written proposal, which was reviewed in the interim and discussed for the first time on February 23. That proposal contained the 20-percent service charge provision. The record does not reflect whether the subject of checkoff first arose in these talks on February 23 or at the next meeting on March 9, but it is clear that such a discussion occurred at one of those sessions and that the Union made a convincing argument, in voicing its objections, on the basis that Fundacion made deductions for others without charge. Thereafter, Respondent Fundacion did not insist on its service charge proposal, but instead promptly withdrew that clause at the March 9 meeting, and agreed on the basis of the clause in the expired contract. Under these circumstances, to find a violation of the Act here one must perceive the law to be that an employer commits a technical *per se* violation of the Act the minute it makes such a proposal, even where it is promptly withdrawn without insistence after hearing convincing arguments from across the table. In my view this is not the law. Thus, the Board has for some time expressed a disinclination to find *per se* violations. I find and conclude that Respondent Fundacion did not violate Section 8(a)(5) and (1) by including the service charge provision in its contract offer of February 14, as alleged in paragraph 8(d) of the complaint.

D. *The Bargaining Concerning Fundacion's Medical Plan Proposal*

The package counterproposal Respondent Fundacion orally submitted to the Union at the March 9 meeting contained a medical plan known as "Blue Cross Plan 1000." Under the provisions of this plan, as explained by credited testimony by Raul Salgado, the employee becomes eligible to enroll in the plan at the first year of employment. From the beginning of second to the end of the fifth year Fundacion would pay only for the employee's coverage. Thereafter, following the faculty member's securing of tenure, Fundacion would pay for coverage for both the employee and his family.

The General Counsel alleges that following the March 9 meeting the College bargained directly with the unit employees, and in bad faith with the Union, by offering the faculty a better medical plan than it offered the Union in negotiations. It is also contended that Respondent Fundacion further violated the Act by withdrawing the allegedly better plan after the Union accepted that portion of the package proposal at the March 23 meeting.

The basis of the General Counsel's theory concerning the medical plan is the wording of a memorandum, stipulated into evidence, dated March 14, 1979, addressed to "members, contracting unit Puerto Rico Junior College" from Jose F. Mendez, president, setting forth the College's counterproposal. Item 5 of that summary states:

> Plan 1000, offered by Cruz Azul de Puerto Rico, with major medical, was offered. Concerning eligibility to join the plan, any person who has worked for a year or more is covered. Family plan will be obtained when tenure is obtained. The expenses of this plan are totally paid by the Fundacion.

However, the General Counsel's witnesses were unable, in the face of Salgado's assertion that the March 9 and 14 medical clauses were one and the same, to recall what specific respects in the March 9 medical clause were different. Indeed, Union Secretary Rodriquez agreed they were "similar," while Idsa Alegria admitted that Plan 1000 was offered, but could not remember any details. She pointed to the last sentence of item 5 in the March 14 memorandum as the source of the Union's argument that two different proposals were offered, but could not

[6] Since I have considered the restoration of the evaluation procedure on March 21 and April 9 as a factor in deciding that Fundacion bargained in bad faith during negotiations over this issue, I do not find the restoration of these procedures to be a separate unilateral change in violation of the Act as alleged in pars. 8(f) and (h) of the complaint.

explain in what manner.[7] I therefore find that the General Counsel has failed to prove that Fundacion directly offered unit employees a better plan than was offered at the bargaining table. Therefore, in addition, Respondent Fundacion did not renege on any agreement at the March 23 meeting when the Union "accepted" the medical clause in the March 14 memorandum.[8]

I find that Respondent Fundacion did not violate Section 8(a)(5) and (1) of the Act as alleged in paragraphs (e) and (g) of the complaint.

IV. THE ALLEGED UNFAIR LABOR PRACTICES IN CASE 24–CB–1053

On April 18 the Union held a meeting of its membership at which its secretary general, Carmelo Rodriquez, addressed those present. His topic was a review of the entire negotiations with a heavy emphasis on Fundacion's economic offers which he characterized as "minimum." Rodriquez then recommended strike action since the likelihood of Fundacion hiring replacements would be minimized by the proximity of examinations and graduation, affecting 7,000 students. He, therefore, expressed his opinion that the best time of strike was at hand. Then Idsa Alegria moved that the membership authorize the Union's board of directors to call a strike. A strike was authorized. Felix Rivera Resto, the Union's information and propaganda secretary, was also authorized to issue a press release at the appropriate time.

On April 20 the parties met for the final time before the strike. According to Rodriquez at least 18 clauses were initialed by the parties as agreed to at that meeting. These clauses included the checkoff and medical clauses, which had been the subject of considerable dispute, and other substantive clauses relating to economics, hours, and working conditions. Total agreement on a contract was not achieved. Those items not agreed to included the evaluation clause for faculty probation, rank, and tenure; and other clauses about salaries, summer pay, yearly bonus, life insurance, pay for extra classes, Christmas bonuses, leave with pay, accident insurance, and the accumulation of vacation time per month.

On April 21 the Union's board of directors met and selected April 25 as the date for the commencement of the strike. A propaganda committee was formed under the direction of Professors Resto and Alegria which prepared a press release, published in El Mundo on April 24 stating that the strike "is due to the fact that the group is trying to negotiate a collective bargaining agreement . . . for the past nine months without success." The article also quoted Carmelo Rodriquez as announcing, "the strike would be of an economic type . . . ." In his testimony Rodriquez conceded it was "very possible" he told reporters that the strike would be of an economic nature. The strike began April 25. Pictures taken that day of picket signs show only economic captions, mainly expressing the faculty's desire for a pay raise. I, therefore, find, in accordance with the undisputed evidence, that the strike by the Respondent Union began as an economic strike having as a purpose compelling the modification of the contract.[9]

The above findings concerning the legal status of the strike at its inception are relevant only in assessing the Respondent Union's defense. It is admitted that the Union failed to comply with notice requirements set forth in Section 8(d) of the Act. However, Respondent Union contends that it is excused from its failure to comply by Respondent Fundacion's unfair labor practices which, it argues, caused the strike. However, I have found that the strike was not caused by Respondent Fundacion's unfair labor practices, but rather by economic circumstances. Moreover, Respondent Fundacion's unfair labor practices, described herein, do not stem from a rejection of the Union as majority representative and are not of such a flagrant nature as to otherwise excuse the Respondent Union from compliance with Section 8(d) of the Act. Consequently, the holding of the United States Supreme Court in *Mastro-Plastics Corp., and French-American Reeds Manufacturing Company, Inc.*, 350 U.S. 270 (1954), as reiterated by the Board in *Mrs. Fay's Pies, Inc.*, 145 NLRB 495, 497 (1963), cited by the Respondent Union, is not controlling. Furthermore, as noted by counsel for the General Counsel in her brief, the Board has held that strikes to compel a change in contract terms call for prior compliance with Section 8(d) even if the employer had not bargained in good faith concerning them, *Telephone Workers Union of New Jersey, Local 827, International Brotherhood of Electrical Workers, AFL–CIO (New Jersey Bell Telephone Company)*, 189 NLRB 726, 731 (1971); *Local 156, United Packinghouse Workers of America, AFL–CIO, et al. (Du Quoin Packing Company)*, 117 NLRB 670 (1957). I find and conclude that Respondent Union violated Sections 8(d) and 8(b)(3) of the Act as alleged in paragraphs 9, 10, 11, and 14 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unilaterally terminating the existing faculty evaluation procedure governing probation, rank, and tenure on or about February 16, without prior notice to or bargaining with the Union, and thereafter refusing to bargain with the Union concerning the inclusion of an evaluation procedure clause in any agreement between the parties, the Respondent Employer violated Section 8(a)(5) and (1) of the Act.

4. The strike of the Respondent Employer's faculty members, which began on April 25, was not caused by

[7] Whether the Union's negotiators became confused by the sentence structure of item 5 in the March 14 memorandum, or by the differences in the meaning of "eligibility," "coverage," and "totally paid," is not clear in the record, and therefore any finding based on this possibility would be based on speculation.

[8] On April 20 the parties reached agreement on the medical clause.

[9] It is unnecessary for the purpose of deciding the issues in this case to decide whether or not the strike was thereafter converted to an unfair labor practice strike. I note that Cases 24–CA–4146 and 24–CA–4154, relating to that question and its effect on strikers who may have offered to return, are not before me by reason of a final decision by the General Counsel not to issue a complaint in those cases.

the unfair labor practices of the Respondent Employer, and was, therefore, at its inception, an economic strike.

5. By engaging in a strike having as a purpose compelling a modification of the existing contract, without having first complied with the provisions of Section 8(d) of the Act, the Respondent Union violated Sections 8(b)(3) and 8(d) of the Act.

6. The Respondents did not violate the Act in any respects other than those specifically found.

THE REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find it necessary to order that the Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since the Respondents' unlawful conduct has, in each instance, been limited to a single narrow and specific breach of their obligation to bargain in good faith, as opposed to a lack of intention to reach an agreement or engaging in a course of conduct designed to frustrate bargaining, I find that a narrow and specific order is appropriate. Furthermore, since the Respondent Employer resumed utilizing the faculty evaluation procedure governing probation and tenure on March 21 and rank on April 19, an affirmative provision in the Order with respect to that issue is unnecessary.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

A. The Respondent Employer, Fundacion Educativa Ana G. Mendez d/b/a Puerto Rico Junior College, Rio Piedras and Cupey, Puerto Rico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Asociacion de Maestros Universitarios by unilaterally terminating or discontinuing existing faculty evaluation procedures governing probation, rank, and tenure without prior notice to or bargaining with the Union.

(b) Refusing to bargain collectively with the Union by refusing to negotiate concerning the inclusion of faculty evaluation procedures governing probation, rank, and tenure in a collective-bargaining agreement between the parties.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union concerning the inclusion of faculty evaluation procedures governing probation, rank, and tenure, and, if agreement is reached, embody that understanding in a signed collective-bargaining agreement.

(b) Post at its premises in Río Piedras and Cupey, Puerto Rico, in both the English and Spanish languages, copies of the attached notice marked "Appendix A."[11] Copies of "Appendix A," on forms provided by the Regional Director for Region 24, after being duly signed by an authorized representative of the Respondent Employer, shall be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent Employer has taken to comply herewith.

B. The Respondent Union, Asociacion de Maestros Univeritarios, its officers, representatives, and agents, shall:

1. Cease and desist from engaging in a strike or work stoppage having as a purpose compelling a modification of the existing contract, without first complying with the conditions prescribed by Section 8(d) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post, in English and Spanish languages, in its offices and meeting halls copies of the attached notice marked "Appendix B."[12] Copies of "Appendix B" to be furnished by the Regional Director for Region 24, shall, after being duly signed by an official representative of the Respondent Union, be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union and its agents to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Forward to the Regional Director for Region 24 signed copies of "Appendix B," in the English and Spanish languages, for posting by the Respondent Employer, if willing, at its Rio Piedras and Cupey, Puerto Rico, facilities where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

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[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[12] See fn. 11.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain in good faith with Asociacion de Maestros Universitarios concerning the inclusion of faculty evaluation procedures governing probation, rank, and tenure for those employed in the collective-bargaining unit; and we will, upon request, bargain with the above-named Union concerning the inclusion of an evaluation clause, and, if agreement is reached, embody that understanding in a signed collective-bargaining agreement. The collective-bargaining unit is:

All full-time teaching personnel employed by the Employer, Fundacion Educativa Ana G. Mendez, at its two Puerto Rico Junior College campuses located in Rio Piedras and Cupey, Puerto Rico; including instructors, associate professors, professors, Academic Counselors II, the Specialists in English, Spanish and Mathematics and athletic instructor/coaches.

WE WILL NOT unilaterally terminate, discontinue, or otherwise change the existing faculty evaluation procedures governing probation, rank, and tenure, without prior notice to or bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

FUNDACION EDUCATIVA ANA G. MENDEZ
D/B/A PUERTO RICO JUNIOR COLLEGE

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT engage in a strike or stoppage having as a purpose to compel modification of an existing contract without first complying with the provisions of Section 8(d) of the Act. That section of the Act prescribes, in relevant part, that:

No party to [a] contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof, or in the event such contract contains no expiration date, 60 days prior to the time it is proposed to make such termination or modification;

* * * * *

(3) notifies the Federal Mediation and Conciliation Service within 30 days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the disputes occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later:

ASOCIACION DE MAESTROS UNIVERSITARIOS